Diversity of employment contracts and use of the law

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A trend towards the individualization and increasing flexibility of employment relationships has characterized many sectors of the French economy in recent years. This has challenged traditional systems of defining work and qualifying workers, although the unlimited-term employment contract is still the main legal framework used in employment relations[1]. The most recent empirical studies show the multiplicity of employment relationships with reference to differentiated personnel management practices in firms (Petit, 2003; Beffa et ali., 1999). Based on these studies, some authors emphasize the fact that French labour legislation affords a degree of flexibility. This allows for diversity by multiplying the legal forms of the employment contract, witnessed primarily in the increase in so-called particular contracts that depart from the unlimited-term contract norm, or contracts based on commercial law. From a more normative point of view these authors propose reforms to labour law, intended to enhance its coherence and widen its diversity so that the complementarity of the various employment relationships can be recognized and guaranteed (Beffa et ali., 1999). Other authors, in the tradition of the De Virville Report (2004), propose new contracts such as the 'project contract' as well as reforms to French labour legislation by increasing the formalism of the unlimited-term contract. In a configuration marked by greater flexibility and differentiation of labour conditions, employees should have to sign a real 'job contract' with their employer, in which the terms of their mutual commitments are explicitly stated (Bessy, 2004).

It was based on this type of questioning on the formalism of the employment contract that we studied practices concerning the drafting of contracts. The general idea was to illuminate current practices in firms and their use of the law in the drafting of employment 'contracts'[2]. Our findings show that, apart from the authentification of the act of recruitment and formal obligations concerning particular contracts, the significance and purposes of a written document can differ. For instance, the 'contract'

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[1] Unlimited-term contracts currently account for roughly 90% of all employment contracts (in stock).

[2] Throughout the rest of this article and for practical purposes we have put the word 'contract' in quotes to indicate that these are not always real contracts – unless we apply a purely formal definition that limits the employment contract to a written document signed by both parties.

may simply be intended to inform employees of their main employment conditions which have been defined elsewhere, usually in collective bargaining. But the drafting of the 'contract' may be oriented more systematically towards providing guarantees in the event of dispute or conflict, going so far as a form of instrumentalization of the law for the sole benefit of the employer's security as regards the law.

Our main hypothesis is that these uses of the law are not unrelated to the firms' personnel management practices, to the fact of their aiming for flexibility or not, and to the employees' subordination or individual accountability. In fact they participate in such practices. The content of the 'contract', that to varying degrees crystallizes a learning process related to prior disputes, can then be considered as a source of information on the rules framing the employment relationship or, at least, the rules in relation to which the parties seek guarantees of one kind or another.

It is in this perspective of analysing the practices concerning the drafting of employment 'contracts', in relation to firms' manpower management methods, that we compiled a data base of 'contracts' (see annexe). The data base consists of a total of 309 'contracts', most of which were signed in the past ten years. Over 200 firms in various sectors are represented. We completed this information with data on the characteristics of the firms and the jobs concerned, and constructed a coding grid to identify the various types of information in the 'contracts'. This served us for our quantitative analysis and construction of a typology of 'employment contracts' that enabled us to identify interdependencies between these different types of information. This work also drew on a series of interviews in firms and with legal experts, that furthered our understanding of the objectives of the people who draft employment 'contracts' and their anticipation of possible disputes[3].

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[3] This research owes a great deal to an initial exploratory survey on the possibilities of constructing an 'employment contract' data base, undertaken for a report financed by the French Ministry of Research (Bernardi et al., 2003). We wish to thank the authors of that early report for their subsequent contribution and advice. We also wish to thank C. Teissier for his encouragement and wise comments, as well as C. Didry and E. Serverin who were involved in the first phase of this work. The present study has been financed by the French Ministry of Social Affairs, Work and Solidarity.

In the first part of this paper we present our framework of analysis based on an institutionalist approach to employment relations. This approach is in turn based on the French economy of conventions approach (Bessy and Favereau, 2003) and certain arguments of neo-institutional theory as defined by Williamson (1985). We have used this framework of analysis here more to illuminate our research question, to construct our variables and to interpret our findings than to propose a validation in relation to other analytical hypotheses. Our subject is above all empirical and designed to show the advantages of constructing an 'employment contract' data base. This type of data base can be used to identify differentiated practices and provide empirical material to illuminate French reforms concerning labour contract legislation, in the absence of sound empirical data on the subject[4]. In this perspective we also provide information on the French legal conception of the employment contract.

In the second section we justify the choice of variables taken into account in multidimensional statistical analysis, including those that participate actively and those that are simply illustrative. In the third section we present the results of our typology and in the fourth section we discuss them and show certain limits of the present data base.

1- The framework of analysis and French employment contract law

The analysis of 'contractual choices' has been the subject of an abundant economic literature over the past three decades (see Masten, 1999). Several currents in that literature emphasize the 'incomplete' nature of contracts due to the parties' impossibility of foreseeing all possible contingencies and the high cost of court action. In particular, neo-institutional theory stresses the relational dimension of certain contracts (relational contracting). In configurations where the aim is to perpetuate the relationship, agreement between the parties is based less on a detailed specification of obligations than on a general framework defining the process of adjustment of the terms of agreement over time, that is, a set of constituent rules framing future

[4] No 'employment contract' data base is currently available and no survey has been undertaken to assess the actual content of 'employment contracts', such as the WERS survey in the UK (Brown et ali., 2000).

interactions (Goldberg, 1976; Macneil, 1978). In this perspective, 'complete contracts' can only frame short-term relationships based on largely unspecified resources and fairly stable expectations concerning possible points of dispute for which the courts are considered competent.

Within the neo-institutional current, based on the economy of transaction costs (Williamson, 1985), many empirical studies that draw on 'contract' data bases have shown regularities between certain contractual terms and the characteristics of transactions (Masten, 1999). However, few studies have specifically analysed the contracting parties' expectations when they sign a written document. The study by Lyons (2000) on a survey of British inter-firm agreements in the manufacturing sector is an exception. We have chosen here not to discuss the results of this survey which are fragile because the author is confronted with the difficulty of measuring the 'completeness' of contracts in 'relational contracting'. Our starting point is simply the question of the written or unwritten nature of the contract and the role of written contracts. Two roles can be distinguished. First, written undertakings can be designed to ensure that each party is fully aware of the terms of the relationship, and to clarify those terms. Second, the parties may want to protect themselves by introducing clauses that they believe have a direct legal effect in case of breach of contract. The results show that the former objective is the most prevalent even if court action is frequent in case of dispute.

We have opted for two lines of interpretation of our results. One concerns the role of the written 'contract' and, in particular, the distinction between the aim of clarifying employment conditions and that of providing legal protection. The other line of interpretation is based on the idea that the parties in the transaction put into writing those clauses that can legally be defended the most easily in case of dispute. As regards the rest, their intention is to frame their relationship by a set of implicit rules allowing adjustments over time, especially if they wish to perpetuate the relationship and therefore to make specific commitments.

These two ideas must nevertheless be adjusted to the nature of our 'contract' data base and especially its context: the French labour market. As regards the data, all we have is

the 'contracts' themselves and certain information on the characteristics of the jobs and the firms concerned. There is no possibility of directly measuring the nature of the commitments underlying the employment relationship. As regards the labour market, contractualization practices are infrequent due to the weakness of the employees' position and the protective role that the law and collective labour agreements play in their respect. These characteristics are probably even more marked in the case of France, compared to the UK for instance[5], due to the weight of State intervention in regulation of the labour market and collective bargaining. Moreover, apart from differences in the judicial culture, French labour law was initially constructed in opposition to the Civil Code and especially to the fiction of a contract based on the equality between the parties.

We therefore assume that the text of the written employment contract signed at the time of recruitment is not neutral[6] and that its formulation and content are based on a certain conception of the employment relationship and a set of implicit rules defining mutual expectations. Although the interests of the parties concerned by the employment relationship are distinct and antagonistic, they do rest on a certain form of solidarity conducive to cooperation. This cooperative commitment binding the parties acts in a complementary way to their more formal contractual commitments with directly judicial consequences. The idea is not that these formal obligations codify cooperative commitments themselves, which are subject to mutual tolerance, but simply that they provide benchmarks for settling disputes between the parties when they consider that there has been breach of mutual tolerance and violation of the implicit rules.

The concept of an implicit rule as we use it differs considerably from that developed by relational contracting theory (Williamson, 1985) in which the inter-individual dimension of the agreement is emphasized, with little importance granted to its

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[5] Although the institutional environment is different, research on the British case shows that contractualization has not been developed in employment relations and that written documents generally have an informative purpose. See Brown et ali. (1998).

[6] As in the case of an earlier study on job advertisements (Bessy et ali., 2001).

collective dimension, that is, observance of rules governing interaction, defined by a group or a larger community[7]. What we introduce as well is the idea that cooperative commitment has meaning in a collective with shared values such as the firm, a branch of industry, a particular territory or even society as a whole.

To understand the context of the French labour market we need to revert to the plurality of representations of the common good, referred to here as 'conventions', underlying the social link and State intervention. Via legislation, the State decides on the order of priority to establish in the medium term between the main classes of social goods[8]. Three types of convention or model of implicit relationship can be distinguished. The stability of these conventions or models is provided by the rules of French labour law, the justification and codification of which were initially based on the conventions. This enables us to account for the plurality of principles of justification in which French employment contract legislation is grounded, as the controversies between the different legal doctrines attest (Bessy and Eymard-Duvernay, 1995).

The status model

The first model of implicit relationship corresponds to an employment relationship governed primarily by a negotiated collective status, based on job stability. The employee's expectation is based on job security within the firm and on the fact that the labour and employment rules are defined in relation to a 'work post'. This allows for a high level of equality that leaves room for forms of remuneration based on individual

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[7] We are referring to Lindenberg's (1998) critique of Williamson, based on his theory of sharing groups and relational signals. This critique rests on the idea that the distinction between different contractual forms does not correspond to different equilibriums of the same framework of strategic calculation, but that there can be frame duality. The results of interaction in which an interest is at stake are judged both on their content and on the relational signal that emerges. Any behaviour constitutes a relational signal of a form of relationship, especially since relations of cooperation, if not of solidarity, are fragile. This makes problems of interpreting these signals all the more difficult, and justifies the role of groups who guarantee and memorize the rules for interpreting these signals.

[8] Based on the pluralistic theory of justice defended by Boltanski and Thévenot (1991), in Bessy and Favereau (2003) we show the articulation between different principles of justification of the common good and legal rules.

performance. In this configuration, adjustments that can depart from the most codified norms must nevertheless be set on rules transcending particular arrangements. For a long time this type of employment relationship constituted a powerful model of inspiration of French labour legislation. Due to the de facto inequality between the parties, the legislation was designed to protect the worker in relation to a status (Camerlinck, 1958). In addition to this specifically French model (Marsden, 1999), two other models applied more frequently in other countries can be distinguished.

The hierarchical authority model

The second implicit model, that has also inspired labour legislation and especially the definition of the employment contract based on a relationship of subordination, relates to the hierarchical authority of the employer who must nevertheless make decisions in the interests of the firm (Durand, 1947). This is the relationship of authority described by Williamson (1985) and modelled by Simon (1951). Flexibility is promoted in so far as the employee agrees to an authority that assigns tasks, although within certain limits, and can impose sanctions. This model has nevertheless evolved due to the legal framework limiting the employer's disciplinary power (the so-called Auroux laws of 1982), and to changes in customs that challenge hierarchical authority and promote greater autonomy of workers.

The market model

In these first two models the role of the contract is reduced to next to nothing; it serves primarily to trigger a set of pre-established rules. By contrast, in the third model the role of the contract is more assertive in the definition of the employment relationship. Here the parties enjoy a degree of contractual freedom at the origins of the concept of a contract inherited from the French Civil Code (in which the 'rental' of services is referred to) and based on the equality of the parties. Due to greater symmetry in each party's powers of negotiation, the contract creates a system in which the interests at play are balanced, and thus a more complete form of contractualization. In particular, it introduces clauses of variation depending on the expected contingencies, and mechanisms for rewarding individual performance. Although they are important, the more formal terms of the contract are simply benchmarks from which the actors can

depart if there is a need to adjust to market constraints. It is in this sense that we talk of a 'market model'. But in this model the perpetuation of the relationship is not necessarily an objective. When the terms of the 'contract' are challenged it is its most formal characteristics that are used in legal proceedings.

These different types of convention can be mixed and constitute pre-established models of action to which the parties in the employment relationship can refer. Until recently (the late eighties and early nineties), most employment contracts in France were considered by jurists to be standard terms agreements (*'contrats d'adhésion'*), that is, non-negotiable. Employment relations based on a contractual frame negotiated by both parties were exceptions.

In this particular configuration the predominant legal conception of the employment contract is based on a compromise between the hierarchical authority model and the status model. The inter-individual agreement attesting to the employment contract is only an 'act condition' that leads to adhesion to a pre-established professional status and respect for the employer's authority. This makes the signing of a written document more relevant, especially when the firm wants to retain all its powers to define the employment conditions. When 'employment contracts' are put into written form, the intention is primarily to inform employees of their conditions of employment. Most of these conditions are determined by the law or collective bargaining (salary, working hours, job definition with reference to a classification). In the absence of an obligation concerning the form of an unlimited-term contract, only industry-wide collective labour agreements require that employees be given a written document informing them of their main conditions of employment.

This legal conception of the employment contract evolved in France under the impact of at least two factors. First, the arrival of Community law with, in particular, the European directive of 14 October 1991 relative to the employer's obligation to inform the employee of the conditions applicable to the employment contract or relationship. Apart from providing better protection for employees, by granting them the right to individual information, this obligation should allow for greater transparency of the labour market. The study of changes in certain industry-wide collective labour

agreements shows that by transposing this obligation to inform, contract law participates in the codification of inter-individual employment relations.

But this change is even clearer with the switch in judicial precedents in the late eighties and early nineties, concerning amendments to the employment contract. The employer's power is now limited in so far as any proposal to amend an essential element in the labour contract has to be explicitly approved by the employee (Wacquet, 1999). Claiming to protect employees, legal precedents reaffirm the contract mechanism and the value of initial commitments in an economic configuration – despite the fact of it being marked by a strong demand for flexibility in employment relationships[9]. The negotiation of flexibility should therefore be shifted to collective bargaining where the interests of the parties are more fairly balanced.

These two legal factors have resulted in more explicit commitments and therefore to an increase in written 'contracts' in recent years. This is confirmed by our interviews in firms in various sectors. In addition, more economic factors have led to the individualization of the employment relationship, especially as regards the remuneration of individual performance.

All these factors contribute towards a certain 'revival of the employment contract' and the development of contractualization practices, but without reducing the diversity of such 'contracts' as regards employment conditions and the role of the written document. The documents in our data base are thus a source of information on employees' working conditions that enables us to contrast different types of labour relations.

We posit, moreover, that this type of document also makes it possible to identify the different parties' objectives when they draw up the employment contract, and especially the role they intend contract law to play in legally protecting their interests. Considering the high empirical cost of extending our research directly to the actors'

[9] These decisions are based on Article 1134 of the Civil Code that specifies the precedence of initial commitments in the main terms of the employment contract.

intentions when they drew up a 'contract', we adopted an indirect approach based on the implicit models of employment relations defined above.

Hence, the market model of the employment relationship corresponds closest to a narrow specification of the terms of the individual employment contract and relies on the most formal characteristics in case of dispute. But reliance on formal obligations can be developed in all cases where the employer wants enhanced legal safeguards due to changes in labour contract legislation. This gives us a clue as to how to interpret the fact that when agreements are being drawn up, employers introduce clauses to escape the constraint of the law, primarily concerning flexibility in the definition of working conditions. This type of clause has the effect of undermining the protection of employees afforded by labour legislation in so far as the latter aims to limit employer's decision-making power[10].

It therefore seems important to take into account the way in which the law can be instrumentalized by the actors. In this perspective, reliance on the formal characteristics of the employment contract corresponds to a power struggle in which each party tries to protect its 'interest' by using the law and constructing equivalences to define interests that can be protected legally. In order to take into account the actors' strategic actions, we therefore work on the threshold of the implicit agreement model underlying the employment relationship, with its cooperative commitment in the construction of a common good.

2- The choice and construction of variables

This section sets out the main elements that guided the choice and construction of variables, starting with the way of coding the information collected from 'contract' documents. For more details on the characteristics of our data base and especially on its representativeness, the reader is referred to the methodological annexe.

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[10] Note that Article L 120-2 of the French Labour Code (following the 31 December 1992 Act on individual rights), authorizes the employer to limit individual and workers' rights only if such restrictions are in proportion to the objective and justified. For instance, clauses concerning mobility have to be consistent with the efficient functioning of the firm and respect the constraints of the employee's personal life to some degree.

The coding of information in the 'contracts' posed formidable problems of equivalence. The main difficulty stemmed from the fact that most of the documents collected are a hybrid of a contractual agreement and a written statement on 'employment conditions'. Not all the clauses in the 'contracts' are contractual by nature; often they are simply a 'reminder' of the rules defined by the employee's collective status. Some correspond to the labour regulations defined by the employee's collective status; others may refer to advantages that the employer sees not as obligations but simply as pieces of information. Finally, certain clauses are not always licit (that is, not always validated *a posteriori* by the judicial system), which means that even 'illicit clauses' can have a threatening effect when incorporated into the agreement. We have not attempted to define an obligation or piece of information, a licit or illicit clause[11]; that is for the courts to decide.

Based on our coding we constructed a large number of variables that did not exhaust all the information in the documents but were, in our opinion, relevant to our research question. Out of a total of seven main groups of variables (see Tables 1, 2 and 3), five played an active role in our analysis: variables relative to 'conditions of recruitment and breach of contract', to the 'definition of employment conditions', to the employee's subordination', to the 'protection of immaterial assets', and to the 'employee's individual accountability'.

The other two groups were used for illustrative purposes. In particular, we constituted a group of variables enabling us to identify references in the 'contracts' to institutional devices and in particular to other documents with a legal value such as laws, collective agreements (industry- or company-wide) or company rules. We also took into account the reference to uses (trade-specific or company practices). These variables (see table 2 on institutional devices) were distinguished according to whether the rules were

[11] From this point of view we share the sociological analysis of law proposed by such authors as Lascoumes and Serverin (1995), for whom it is important to analyse the way in which the law is mobilized by the actors, irrespective of the validity (in legal terms) of their actions or expectations. We nevertheless applied a minimum of legal knowledge, especially on employment contract law, to guide our coding and bear in mind the different legal resources available to actors for drawing up 'contracts'.

negotiated collectively or determined unilaterally by the employer, or whether they only concerned the determination of wages or other terms of the 'contract'.

These additional variables helped to explain the absence of certain elements in the 'contract', such as details on bonuses. The main difficulty of our analysis stemmed from the fact that certain written documents explicitly mentioned elements even if they were codified in other documents. The contract can thus act as a reminder of the conditions applicable to the employment relationship. We also lacked information on the context in which the 'contracts' were drafted. Such information would have enabled us to know if certain elements codified by collective agreements and mentioned in the 'contract' really were contractualized by the parties – in which case they would be free to ignore changes in collective agreements.

Finally, to account for the constraints imposed by the 'market', we took into account any mention made in the 'contracts' of 'customer satisfaction' or of anyone (patient, user, etc.) with whom the worker would have face-to-face contact in the course of his or her work.

The other group of variables concerns the characteristics of jobs (level in the hierarchy, type, etc.) and firms (size, turnover, trade union presence, etc.) referred to in the 'contracts'. This information, provided in the annexe, helps to understand the composition of our base.

The following sub-section presents the five main classes of active variables in the typology. Note that certain variables refer to the construction of synthetic indicators by addition of dummy variables (see recapitulative table 4 in annex). This makes it possible to measure intensities in relation to a particular dimension and, in some cases, to solve problems of distinction between information in 'contracts' with very similar meanings.

2-1Conditions of recruitment and breach of contract

To account for the information relative to conditions of recruitment and breach of the employment contract, we constructed two types of variable. One indicator is designed to measure the intensity of guarantees sought by the employer during the recruitment

process (elements of proof of CV, aptitude tests, employee's availability, etc.) and on which the final signing of the contract depends.

The other variable concerns the conditions of breach of the employment contract (trial period, length of notice, etc.). Note that even if this variable is considered to be an indicator of a policy of drafting 'contracts' essentially for informative purposes – since the details concerning breach of the employment contract are usually codified in collective agreements or legislation – the fact remains that they may also be mentioned by the employer to avoid certain disputes.

2-2 Definition of employment conditions

We constructed a series of variables to account for the way in which employers try or not to make their workers' employment conditions more flexible as regards the definition of the work content, working hours, workplace and salary. For each of these elements, we distinguished information in the 'contracts' through which employers commit themselves to 'stable' working conditions, from those through which they force their employees to agree to a certain degree of flexibility or to share risks inherent in the firm's economic activity and in the variations and changes in the organization of work to which they can lead (Morin, 2000).

We were thus able to measure the flexibility of remuneration (variable bonuses, objectives clause), geographic flexibility (trips and mobility), temporal flexibility (flexi-time) and the flexibility of the job content (multi-skills and functional flexibility). The latter was completed by the construction of a variable to account for the mentioning of 'qualifications' only, without any additional definition of the content of the job. This gave weight to the qualifications of the job occupied by the employee, in relation to industry-wide collective labour agreements or to similar documents (company-wide agreements in large firms).

2-3 The employee's subordination to the firm

Another series of variables was designed to apprehend the degree of employees' subordination to the firm, by taking into account all the information that reduced their leeway in the choice of their work or, more generally, in the allocation of their

resources, as well as in the way of actually doing the work. Flexibility in the definition of tasks or functions, as mentioned above, can be considered as a sign of an employee's subordination (Simon, 1951). But for the employer another way of increasing subordination is by supervising the execution of the employee's work. It is in this perspective that we constructed an indicator by combining all the information concerning this type of supervision. In our coding we distinguished four types of normative device: hierarchical authority, evidenced by a clause stating that the employees is under the authority of a senior in the hierarchy; managerial instructions or norms; the obligation to work with certain 'tools and equipment'; and 'conduct and presentation'.

We then took into account the presence or absence of an exclusivity or loyalty clause, to construct another indicator attesting to the intensity of the link of subordination. In this indicator we also integrated the obligation under which the employee is placed to have a place of abode close to the work place. This can be considered as another form of exclusivity that increases the employee's availability for the firm's benefit. This indicator can be interpreted as a way for the firm to develop the employee's loyalty but also to control, if not to optimize, the use of its material and immaterial assets. This restriction on the employee's freedom can be compensated for by fringe benefits.

2-4 Protection of the firm's immaterial assets

The following indicators concern even more direct protection of the firm's immaterial assets and the sharing of the associated rents, the constitution of which is based on the employees' work. We constructed three types of variable. The first indicator relates to the protection of human resources (forfeit for training[12] or non-poaching clause).

The second indicator relates to the protection of the firm's competitive advantage that involves an undertaking by the employees not to practise unfair competition other than by transferring intellectual property rights. We broke this indicator down into three sub-indicators. The first relates to the non-competition clause. The second relates to

[12] When a firm has financed an employee's training, the employee has to refund part of those costs if he or she resigns within a period currently limited to three years.

clauses in which the firm protects its clientele by granting itself an exclusive property right, in the course of execution of the contract or after the employment relationship has been terminated. The third measures the obligation of confidentiality (discretion, 'restoration of goods and technical documents', researchers' authorization to publish).

Finally, the last variable concerns clauses in terms of which the employee is obliged to grant back to the employer intellectual property rights: patents, copyrights, especially for the creation of software, and 'trademarks'[13].

In certain cases these different forms of appropriation of immaterial assets by the firm can be compensated for by paying the employee an individual bonus based, for example, on the number of patents registered, or financial compensation as in the case of the non-competition clause.

2-5 Employee's individual accountability

As noted above, one way of making employees individually accountable is by stipulating that a part of their salary depends on individual performance. We distinguished other forms by constructing an indicator grouping together different clauses concerning accountability or 'obligation of means'. We also included clauses in the 'contract' that defined 'misconduct' leading to dismissal for individual reasons or to the suspension of the employment contract. Based on this indicator of the 'employee's individual accountability', we tried to identify all clauses, other than those directly related to individual remuneration, that defined the conditions of sanctions for misconduct or inefficiency in which the employee's individual accountability was concerned. Apart from the incentive dimension of these clauses, they can also be interpreted as systematic anticipation by the employer of disputes concerning the employee's work. In this way the firm is assured of the outcome of dispute or trials in which it may have to justify its decision[14].

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[13] This obligation, based on legal measures (concerning employees' innovation), enables the employer to appropriate innovations even if the employee participated in their creation.

[14] Note, however, that in French law no employment contract clause can validly stipulate that any particular circumstance may constitute a cause for dismissal. This is a controversial point

The five dimensions distinguished above are not disconnected. The clause concerning flexibility of the job content can be considered as a means of increasing the employee's subordination. Moreover, every variable can be related to the others within the same or other dimensions. Thus, certain forms of remuneration granted on an individual basis can compensate for exclusive rights that the firm grants itself concerning the use of certain immaterial resources. In this case, the firm simply shares the rent generated by these assets but maintains control over their use. In general, the objective of our statistic typology is to highlight these relations between the variables.

3- Presentation of the typology

Based on the variables presented above, we have elaborated a typology and retained a partition into four classes (see annex). The classes are presented here by increasing order of complexity of the 'contractual structure', in the sense of the multiplication of guarantees sought, especially by the employer, on the different aspects of the employment relationship.

Class 1: stability of employment conditions and employment relationship defined by collective status

(112 contracts)

This class that groups together over a third of the 'contracts' in our data base is characterized by the extreme weakness of 'contractual guarantees' sought by the employer, especially regarding the flexibility of working conditions. By contrast, the invariability of working hours is prevalent, as are, although to a lesser degree, geographic stability and the payment of set bonuses (especially an extra month's salary). It is in this class that the job occupied by the employee is usually defined in terms of the qualification as defined by the collective status, and in which little mention is made of standards framing the execution of work. The protection of the firm's immaterial assets as well as the individualization of the employment relationship are also minimal here.

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among French jurists who defend the free determination of the content of contracts (Couturier, 2004).

It is in this configuration that reference to a status governing the working relationship is probably the most relevant. This is confirmed by the reference, more often than on average (0.30 against 0.24 for the complete sample), to the industry-wide collective labour agreement with regard to remuneration. Moreover, the brevity of the document may explain the fact that the collective agreement is seldom mentioned (1.84 against 2.36 for the complete sample), since the 'contract' refers to it only once but for all the employment conditions. Note that the level of union membership is high and that this can be linked to the low turnover reported and the strong over-representation of large public-sector firms that still offer employees a status (13% against 7% for the complete sample).

But the weakness of the 'contractual structure' may also be explained by the fact that it is in this class that the highest number of documents drafted in the form of a letter of appointment is found (30% against 18% for the complete sample), and the highest number of fixed-term contracts. Considering that these two forms of document are unrelated, over half of this class contains documents in which the employer's attempt to secure guarantees is necessarily limited. In the case of letters of appointment this is because the document has been drafted with less attention to detail, and a number of aspects, especially concerning the execution of the work and breach of contract, are not mentioned. In the case of fixed-term contracts, the limited duration of the employment relationship is not conducive to the incorporation of clauses of flexibility and protection of immaterial assets, with the exception of IP rights. The structure of the remuneration is also very straightforward. Finally, the regulation of its formalism and content by French law (compulsory clauses) puts this class close to the statutory form.

Class 2: moderate flexibility and significance of the 'collective status'

(73 contracts)

Although characterized by a certain degree of weakness of the 'contractual structure', this class differs from the preceding one in that employment conditions are more flexible, especially regarding working hours and payment of bonuses for collective performance, and fewer exclusivity constraints weigh on the employees. The

workplace is also mentioned less often, but without this being synonymous with a high level of geographic mobility. On the other hand, it is also in this class that the qualification of the job is less often accompanied by an explicit definition of its content, and that the guarantees concerning recruitment and the protection of immaterial assets are weaker.

Insert 1

With the contracts in this class we can talk of an employment relationship in which the employees commit themselves to some degree of flexibility of working conditions. This is connected to the high number of part-time contracts[15] (44% against 25% for the complete sample) and references to company agreements, especially regarding remuneration and working hours (0.55 against 0.42 for the complete sample). This predominance of part-time contracts also explains the over-representation of labourers (15% against 10%), women (42% against 37%) and the obligation to be on call and to work unusual hours (25% against 14%). All these are characteristic of jobs in the commercial sector which is strongly represented in this class (23% against 12%). They are mostly 'standard' jobs, in the sense of requiring few competencies and little commitment to the employment relationship. The weakness of recruitment guarantees (1.22 against 1.6) and protection of immaterial assets confirms this. It is in this class that the protection of the firm's competitive advantage is weakest, whether it concerns the protection of its clientele or confidentiality obligations, especially the obligation of discretion (42% against 59%) and 'restoration of goods and technical documents' in case of termination of the employment relationship (10% against 26%).

Note, however, that in the case of a division into six classes, one needs to distinguish a sub-group of about 20 contracts, mostly full-time (82%) and relative to managerial staff (54%) working in very large firms (75%) in which temporal flexibility is related to the set rate system. The structure of remuneration is particularly rich here since it

[15] It can also be linked to the weakness of the obligation of exclusivity, for in the case of part-time contracts this type of clause is hardly acceptable, especially since a ruling by the *Chambre social* of the *Cour de cassation* (the labour section of the appeal court) on 11 July 2000.

includes fixed bonuses, additional compensation for individual and collective performance, and various fringe benefits.

More generally, the definition of employment conditions is related more to a negotiated 'collective status' than to rules defined by the employer. We have already highlighted the importance of company-wide collective agreements, but the impact of the collective agreement is also relatively strong as regards qualification, remuneration and conditions of breach of the employment contract. The value of our synthetic indicator of reference to the collective agreement (GCCOL) is 1.32 against 1.27 for the whole sample. Reference to 'professional uses' is also frequent (0.36 against 0.28). On the other hand, it is in this class that the indicator measuring the reference to 'company rules' (REGENT) is weakest (1.14 against 1.35).

Class 3: generalized flexibility and employee's subordination to the employer's powers

(73 contracts)

The contracts in this class are characterized by a high level of flexibility of working hours and work content. The flexibility of working hours also includes the obligation to do overtime (65.5% against 26.5%) and to work unusual hours (38% against 15%). Although the content of the work is defined, this clarification is intended to ensure employee versatility (24% against 10%) and does not eliminate the constraint of functional flexibility (45% against 21%).

The content of the 'contract' is most often marked by systematic individual accountability. In particular, it is this class that contains most references to dismissal for serious misconduct (29% against 21%), 'individual accountability clauses' (24% against 14%) and 'obligations of means' (19% against 7%). This 'forced contractualization' of employees' commitment to their work goes hand in hand with close supervision of its execution – as attested by the highly frequent presence of all the normative devices distinguished above, especially obligations in terms of 'conduct and presentation' (31% against 8%). The same wish to control employees' work is found in frequent reference to the number of days worked (paid holidays, illness,

absences) (1.86 against 0.85). This tight control of employees' performance is related to the large number of safeguards required by employers (1.98 against 1.6). The quasi-systematic mention made of breach of the employment relationship (2.9 against 2.2), whether it concerns resignation/dismissal or a trial period, may be a sign that the employment relationship can be terminated at any point and that the employer anticipates disputes in this respect.

Finally, with the exception of confidentiality obligations, especially discretion, the indicators of protection of the firm's immaterial assets have very low values, as in the preceding two classes.

Insert tables 2 and 3

Compared to the preceding two classes, all these characteristics attest to the fact that the employers want more guarantees and use the formal means of the 'contract' to ensure highly flexible working conditions, close control of the employee's work and performance and, subsequently, the possibility of terminating the employment relationship at any stage. In this configuration, which corresponds closely to the 'hierarchical authority model', collective agreements[16] play a relatively small part in the definition of employment conditions (GCCOL=1.17 and GACENT=0.33 against 1.27 and 0.42 respectively). These are defined primarily by rules set by the employer (1.53 against 1.35), as attested by very frequent reference to company rules (0.66 against 0.54), a code of conduct (0.16 against 0.11) and company customs (47% against 40%).

The large number of flexibility clauses, especially as regards the definition of the job content and working hours, is related to the high number of part-time contracts (50%). Greater flexibility of job content, especially functional flexibility, differentiates this class from the preceding one. This flexibility enhances the employer's powers to define the content of the job. As regards working hours, part-time labour regulations (Art.

[16] The fact that there is a high number of references to the industry-wide collective agreement (3.34 against 2.36) relates more to the length of the 'contract' document and to its degree of precision than to an employment relationship defined primarily by the collective agreement. The 'contract' mentions all the sources of the definition of the employment relationship with precision, which is a way of highlighting the role of the law.

214.3 of the Labour Code, 20 December 1993 Act) stipulate that employers have obligations of form and, in particular, have to introduce a clause providing for the conditions of changes to the distribution of working hours.

In general, this wish for flexibility and tight control of work is consistent with the characteristics of the firms in this class that are more often SMEs (33% against 25%) than in the other classes, have a relatively high turnover (33% against 24%) and have a very low level of trade unionism (28% against 45%). It is not surprising that the 'hotel and catering' and 'road transport' sectors are strongly over-represented in this typological class (0.19 and 0.16, against 0.07 in both sectors)[17].

In this configuration marked by a systematic reduction of the costs of managing manpower, a systematic sharing of the risks inherent in the firm's business, and employees with very little negotiating power, we can say that the firm instrumentalizes the 'contract'. In this way it reinforces either its supervisory power by introducing clauses of flexibility (except when compelled by the law), or its disciplinary power by systematically making employees individually accountable. A comparison of some of these 'contracts' with the associated company rules (French *Règlement Intérieur*) shows that the former simply copy the clauses of the latter. With this type of formulation the employer acts as if the employee had made a contractual commitment, whereas the employee is simply obliged, by law, to comply with the company rules. This suggests that certain 'clauses' may be considered illicit by the court, although that does not reduce their threatening effect before the dispute has been declared. Finally, the extensive mobilization of the law is also found in the very frequent reference made to legislative texts (84% against 61%).

Class 4: Protection of immaterial assets and contracts negotiated by professionals

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[17] The study by Pignoni and Zuary (2003) shows that it is service activities with a high rate of manpower utilization that most often use dismissal for individual reasons. This corresponds to both these two sectors. Moreover, apart from the fact that in our sample it is the 'contracts' of these sectors that most often mention 'dismissal for serious misconduct', another motive of individual dismissal can consist in the employee's refusal to agree to an amendment in these 'employment conditions'. Since these are sectors tightly constrained by the need for flexibility, we can assume that this type of motive for individual dismissal is also frequent.

(66 contracts)

The last typological class, consisting of the 'contracts' with the most information, is characterized by firms that systematically seek to guarantee protection of their immaterial assets (human resources, clientele and technological assets), geographic mobility and exclusive access to their employees' work. Working hours are usually defined on a set basis. The fact that bonuses based on individual performance are most frequent in this class can be related to the systematic request for guarantees at recruitment, as regards both the employees' qualities and the fact that they are not committed to another employer.

It is in this configuration that reference to the contract in the definition of the terms of the employment relationship is probably the most relevant, due to the real bargaining power that highly-skilled employees have. The 'managerial' group is highly over-represented in this class (0.76 against 0.42). We can assume that it is because these professionals can leave the firm and set up on their own at any stage that employers choose to multiply contractual guarantees designed to protect the firm's immaterial assets or to enhance these employees' commitment to the firm. Note that 'contracts' in this class are the only ones to introduce clauses of forfeit for training and non-poaching after breach of the employment contract.

This commitment that reduces employees' freedom can nevertheless be compensated for by payment of a non-competition indemnity (29% against 6%) and individual performance bonuses (0.92 against 0.36). The granting of stock-options is a clear illustration. But individualized remuneration, associated with enhanced individual accountability (0.84 against 0.53), is also intended to reinforce employees' commitment and to ensure that they share the firm's risks. The relatively high level of collective bonuses (0.14 against 0.12) and of the demand for flexibility in the job content (0.54 against 0.39) and geographic flexibility (1.56 against 0.83) have the same objective.

This commitment to the employment relationship is confirmed by the fact that the 'contracts' in this class are full-time (94%) unlimited-term (95%) contracts with a very strong requirement to do business trips in the framework of outside assignments (79%

against 35%). It is in this class that employment contracts referring to the 'consultancy firms' collective agreement are over-represented the most (0.45 against 0.14)[18]. Even if these professionals are free to organize their time, the delivery of services to clients can explain why the 'contract' refers explicitly to all the normative devices framing the execution of their work, with the exception of obligations concerning 'conduct and presentation'. It is as if the employer wanted to remind the employee who is boss, although the latter is strongly encouraged to act autonomously and to meet customers'/clients' needs. It is in this class that the reference to 'customers'/'clients' is most frequent (3.33 against 1.13), without this being entirely related to the length of the 'contract'.

In this employment relationship, on the boundary between salaried work and a self-employed status, the multiplication of guarantees leads to a formal reduction of the employees' freedom (Supiot, 1999). This applies to the execution of their work and the possibility of working for another employer, during the employment relationship or after its termination. Likewise, reference to company rules is frequent (REGENT=1.61 against 1.35) in employment conditions, although extensive regulation on a profession-wide basis could be expected. Such regulation is found if we confine ourselves to the indicator of reference to the industry-wide collective agreement that reaches its highest level in this class (GCCOL=1.36 against 1.27), or to the frequency of reference to professional customs (30% against 28%), but higher levels could have been expected. This can probably be related to the low level of trade union representation in firms in this class (0.35 against 0.45).

We can therefore conclude that there is a multiplicity of institutional devices framing the employment relationship, even if company rules and market constraints play a key role. It is this presence of the market constraint that, in this configuration, makes the

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[18] The 'Insurance and other financial activities' sector is over-represented (8% against 4%). This can be related to the fact that some classes of employees in this sector participate actively in the constitution of immaterial assets (human assets, financial engineering and clientele) that can be deployed in other firms. See the thesis by O. Godechot (2004) on financial traders who constitute an extreme example. Because of their difficulties in incorporating clauses to protect immaterial assets in the employment 'contract', firms obtain employee's loyalty by paying sometimes exorbitant bonuses.

employment relationship similar to out-contracting with a self-employed worker. In these relationships individual performance objectives can be negotiated (33% against 11%), as can certain particular advantages if the employee is in a position of strength. It is also this market constraint that can explain the frequency of clauses in the 'contract' concerning the conditions of breach of the employment contract (2.42 against 2.23), especially the notice period (64% against 40%). This suggests that the employer anticipates a dispute in case of the employee's resignation. Finally, even if the 'market model' seems to predominate in regulating the employment relationship, causing the parties to rely on the formalism of the contract to protect their interests, the fact remains that, as in the preceding class, the search for the employee's flexibility and accountability can be interpreted as a form of instrumentalization of the law for the benefit of the employer's decision-making power and legal security. But if so that instrumentalization is weak since the employee's flexibility and individual accountability in the case of the 'market model' is far more legitimate.

4- Discussion of the results

To sum up, this division into four classes serves to account not only for the plurality of the employment relationship, in the usual sense of the type of labour relationship or the way of managing manpower, but also for the objectives of the parties in that relationship, and especially the employer, when they draw up a written document with legal formalism (see the graphic representation of the typology). When it comes to highlighting a plurality of employment relations our analysis is limited due to the relatively small size of the sample and the nature of the data and coding. The absence of clauses on certain employment conditions in the written document analysed does not mean that they are not applied in practice and codified in the collective status that applies to that employee. In this respect our indicators for measuring references to collective agreements are fragile because modes of drafting 'contracts' can be very different. At the same time the data in our possession do not enable us to apprehend the particular advantages that can be negotiated by employees on an individual basis. Likewise, the coding work and variables selected for the typology do not make it possible systematically to identify all the clauses used by employers to reserve for

themselves the unilateral right to amend the employment conditions, or to 'contractualize' their disciplinary power. It is therefore necessary to have a more detailed coding and a more complex typology if the parties' use of the law is to be understood more fully.

But apart from these limits, our typology that contrasts different employment relationships is similar to those compiled from data better suited to this type of exercise[19]. It is on the second point concerning use of the law that our analysis based of 'contract' texts is the most enriching. Although we cannot directly grasp the trade-offs between different legal types of employment contract (fixed-term or unlimited-term contract, part-time work, etc.), which is a way of examining the uses of labour law, our study makes it possible to analyse these uses in a more elementary way by focusing on the nature of the guarantees sought at the stage of drafting the 'employment contract'. Reforms designed to increase the formalism of the unlimited-term contract can thus be illuminated.

Briefly, the first two classes relate to an employment relationship governed primarily by a collective status over which the employee and employer have little control. It is not a real employment contract in the sense of negotiation of an inter-individual agreement, and the parties are fully aware of this. From the point of view of use of the law, it is the reference to the collective status that predominates as the main institution in the employment relationship. The written document, as proof of the act of recruitment, is essentially a tool for informing employees of their main conditions of employment, rather than a contractual device oriented towards inter-individual negotiation. This informative purpose does not mean that no dispute is anticipated and that the written document offers no legal guarantee, but that the guarantee concerns only the main elements of the 'employment contract' and is provided by collective agreements.

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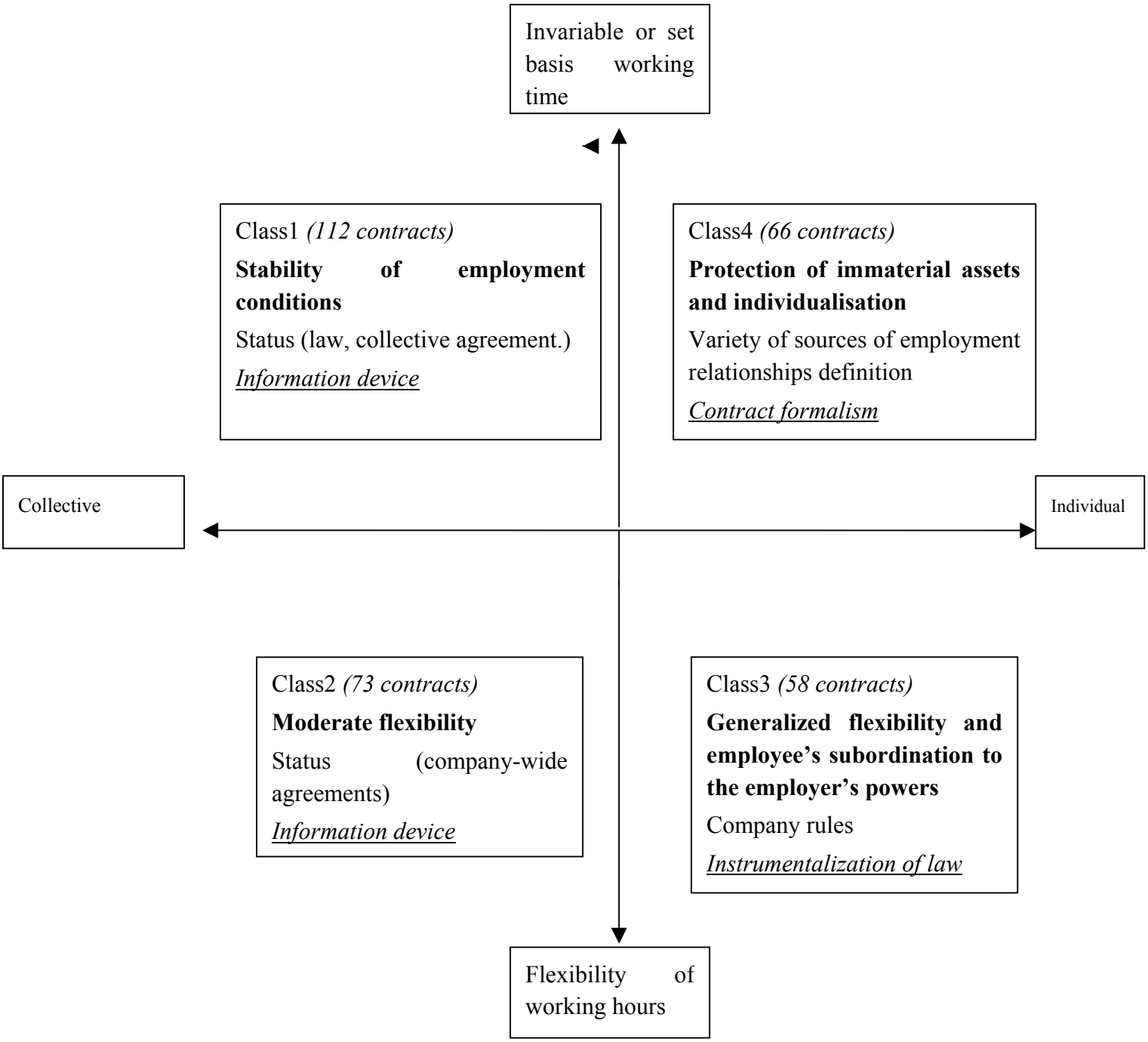
[19] For example, the typology constructed by H. Petit (2003) with data from the 1999 REPONSE survey made it possible to distinguish the 'renovated internal market', the 'cost management' method based on flexibility (two types were distinguished) and ‘professionalized management by projects'. Beffa et ali. (1999) use monographic data to propose a typology that distinguishes 'multi-skills stability', 'market flexibility' and the 'occupation'. These correspond to the classes of our typology, except for the first class in which most of the contracts relate to a typical internal market of a large firm.

Graphical representation of the typology



Legend :

bold : **kind of employment relationship**

clear : main source of employment relation definition.

Italic underline : *use of law*

The second class differs from the first only in so far as it introduces clauses of flexibility – albeit modestly – into the employment conditions. These differences are also largely due to the form and type of 'contract' ('letter of appointment'/'employment contract', unlimited-term/fixed-term contract, full/part-time). In recent years there has been an increase in the 'status model' due to decentralization of collective bargaining and more flexible forms of organization that require more commitment by employees in their work. The company-wide collective agreements signed in accordance with the Aubry laws of 1998 and 2000 on a 35-hour working week provide a clear illustration (Pelisse, 2004).

The common denominator of the other two classes of 'contract' is the multiplication of guarantees sought and, in particular, reliance on the formalism of the contract. Although it is difficult to distinguish *a priori* between contractualized elements and informative clauses, it seems that the latter are frequent and more evident than in the preceding two classes. We can assume that this informative objective has a different meaning in a configuration of manpower management characterized by a high staff turnover and low union membership, and where the rules defined unilaterally by the employer play a relatively important part compared to the negotiated collective status, judging by our indicators. These indicators need to be used with caution, however, and our data on turnover and union presence are insufficient.

Apart from the limits inherent in our data, we can posit that in this configuration it is as if the document signed at the time of recruitment were designed to inform employees without delay of their rights and duties, in the absence of progressive integration into a work collective during which the company rules were traditionally made known. The short duration of the employment relationship, associated with the differentiation of working conditions in time and space, seem to make this informative device even more necessary. It appears to attest to a form of individualization of the working relationship. The fragmentation of work places and times seems to reduce employees' capacity to organize and to be represented, and thus to be able to create norms and devices to defend their rights, typical of a collective. In this configuration, the content of the 'employment contract' seems to be the only thing that they can rely

on, without always being able to master the subtleties of interpretation of certain clauses. The low cost of drawing up written documents (which are usually highly standardized; see annexe) and reproducing them, owing to new information technologies, tends to increase the use of writing to replace oral forms of communication.

In general, this increasing use of writing for informative purposes is connected to the legal and collective agreement obligations that employers have to inform their employees of their employment conditions. Moreover, it has become mandatory to put certain clauses into writing (e.g. length of trial period, non-competition, geographic mobility), even if these conditions are codified in industry-wide collective agreements (Couturier, 2004). It is likewise compulsory to include in the 'contract' a clause concerning changes in the distribution of working hours in the case of part-time contracts. Similar obligations apply to the form of fixed-term contracts or other specific types of contract. The law and collective agreements therefore constitute a factor that can increase the use of formal contracts to observe employees' individual rights to information. But actors within firms participate to a large degree and it is no coincidence that written documents tend to contain far more in a configuration where employees' protection is based less on collective procedures.

Apart from these similarities, the third and fourth classes have differences. The third differs from the fourth in that functional and temporal flexibility rather than geographic flexibility are sought, and in that the employment relationship is individualized via tight control of the employee's work rather than remuneration of individual performance. In this third class, it is the 'hierarchical authority model' that predominates in the definition of the employment relationship. The employer's hierarchical authority is strongly asserted in the 'contract' through the multiplication of references to its powers regarding management, definition of employment and working conditions, and discipline. Certain clauses can be considered as a form of contractualization of the employer's disciplinary power, thus facilitating the dismissal of an employee who proves to be unsatisfactory, for instance by failing to meet the objectives defined in the contract. It appears that when this form of 'contractualization' of the employer's decision-making power undermines the employee protection usually

offered by French labour laws – in so far as the law aims precisely to limit that decision-making power –, the result is a mode of instrumentalization of the law that enables the firm to guarantee its legal security. In this perspective, the 'hierarchical authority model' loses all its legitimacy and the employment relationship tilts over into a pure power struggle in which the employee has few advantages. The standard-terms agreement appears to relate to the forced acceptance, by the economically weak party, of the proposals advanced by the stronger party.

In the last class, if the employer's decision-making powers are referred to, a margin for negotiation seems to be left to the employees, especially when they are in a favourable position in the labour market. The employer's wish for guarantees to protect the firm's immaterial assets or to confirm its power to define the employment conditions can be compensated for. For instance, employees can obtain individual bonuses or fringe benefits, depending on their ability to negotiate and to play on the threat of competition. It is in this configuration that the market model seems to be the most prevalent and that the contract appears to allow the objectives of individualization and adaptation, typical of the efficiency of market mechanisms, to be met. The mutual reliance on formal guarantees increases when the stakes are high, in the sense of losses that either of the two parties can sustain due to an inadequate contract. This more complete form of contractualization does nevertheless involve the risk of being inappropriate if the relationship lasts, due to the possible increase in the specificity of the assets underlying the transaction (Williamson, 1985). The appearance of unpredictable events can be a source of dispute requiring an arbitrator who applies professional standards[20].

Finally, from a point of view of time, the latter two classes are over-represented in the period 2000-2004, whereas the first class is over-represented in the period 1970-1992 (see Table 3). This suggests that the formalism of contracts has increased in recent years, a trend that can be related to the evolution of French labour law and to economic factors that need to be examined. In general, all the 'flexibility' clauses

[20] In their research on 'technical consultants, engineering consultants and consulting firm in NTIC', Fondeur and Sauviat (2002) point out the difficulties to set up collectives rules within such an industry characterized by a high staff turnover.

increased during the period under consideration. But to assess this situation representative data would be required, which presents a real problem, and changes in legal precedents would need to be identified.

To conclude, we have established that there is wide diversity in practices in the drafting of 'employment contracts', connected to the plurality of employment relations and uses of the law. This attests to the flexibility of French labour law but also to its evolution towards a form of protection for employees based more on their individual rights granted by law, regarding information and amendment of employment conditions, than on collective procedures. Although this helps to strengthen the representation of the contract in governance of employment relations, our observations show that the contractual framework and the legal guarantees that it offers are still used relatively infrequently and concern certain types of employment relationship, in particular the ‘contracts’ belonging to class fourth of our typology. In most cases documents written and signed by the parties are intended to clarify employment conditions determined elsewhere, either by collective negotiation or unilaterally, by the employer.

From this point of view an analogy can be drawn with the British case, even if collective bargaining has declined more in the UK (Brown et ali., 1998). But despite its strength in France, collective bargaining clearly plays a part in individualizing the employment relationship and organizing its flexibility, as attested by company-wide agreements on working hours (Pelisse, 2004) or on salaries and individual competencies (Jobert, 1999).

In this configuration, can real benefits be expected from reform of the 'employment contract' based on more formalism that enhances the role of contractual mechanisms? In our opinion the risk is that this would favour the most standard employment relationships and certain forms of instrumentalization of the law by employers, which would not be to the employees' advantage as regards their legal security. It seems reasonable to assume that more sophisticated contracts would have only a limited effect on economic cooperation and would not be enough to compensate for the

insufficiency of occupational regulatory devices allowing for an institutionalization of employment relationships (Supiot, 1999).

References

Beffa J.-L., Boyer R., Touffut J.-P., 1999, " Le droit du travail face à l'hétérogénéité des relations salariales ", *Droit Social*, n°12, pp 1039-1051.

Bernardi M., Bessy C., Chaserant C., Eymard-Duvernay F., Marchal E., 2002, « Stratégies contractuelles et gestion de la relation de travail, Pré-enquête sur la constitution d'une base de données de contrats de travail », Rapport pour le Ministère de la recherche (Appel d'offre ACI Travail). *Rapport de recherche du CEE*, n°11, juillet 2003.

Bessy C., 2004, « Refonder le contrat de travail : les limites du droit », *Connaissance de l'emploi*, n°2, Centre d'Etudes de l'Emploi, avril.

Bessy C., Eymard-Duvernay F., 1995, "Les économistes et les juristes face à la relation de travail dans l'entreprise", *Revue d'Economie Politique*, 105(6).

Bessy C., Eymard-Duvernay F., de Larquier G., Marchal E. (coordinateurs), 2001, *Des marchés du travail équitables ? Une approche comparative France/Royaume-Uni*, Bruxelles, P.I.E.-Peter Lang, octobre.

Bessy C., Favereau O., 2003, « Institutions et Economie des Conventions », *Cahiers d'Economie Politique*, n° 44.

Boltanski L., Thévenot L. (1991), *De la justification*, Gallimard, Paris

Brown W., Deakin S., Hudson M., Pratten C., Ryan P., 1998, *The Individualisation of Employment Contracts in Britain*, Research Paper for the Department of Trade and Industry, june.

Brown W., Deakin S., Nash D., Oxenbridge S., 2000, "The Employment Contract: from Collective Procedures to Individual Rights", *British Journal of Industrial Relations*, pp 611-629.

Camerlynck G.H. (1958), "De la conception civiliste du droit contractuel de résiliation unilatérale à la notion statutaire de licenciement", J.C.P., *Semaine juridique*, I.1425.

Couturier G., 2004, « Liberté contractuelle et encadrement normatif », in *La négociation du contrat de travail*, B. Teyssier ed., Paris, Dalloz.

De Virville M., 2004, *Pour un code du travail plus efficace*, rapport au ministère des Affaires sociales, du Travail et de la Solidarité, janvier.

Durand P (1947), *Traité de droit du travail*, Dalloz.

Fondeur Y., Sauviat C., 2002, *Normes d'emploi et marché du travail dans les métiers liés aux technologies de l'information*, Rapport pour la Dares, N° 63.

Fontaine P., 2003, « Etude sur le contentieux prud'homal cadres », *Action Juridique – Prud'homme Info*, n°163, novembre.

Godechot O., 2004, *L'appropriation du profit – politiques des bonus dans l'industrie financière*, Thèse de doctorat, Conservatoire des Arts et Métiers.

Goldberg V.P., 1976, « Regulation and Administered Contracts », *Bell Journal of Economics*, N°7, pp. 426-448.

Jobert A., 1999, « Négociation collective et individualisation de la relation salariale en France », Communication au 36ème congrès de l'Association canadienne de relations industrielles, Université de Sherbrook, 7-9 juin.

Lascoumes P., Serverin E., 1995, « Le droit comme activité sociale : pour un approche wébérienne des activités juridiques », dans Actualité de Max Weber pour la sociologie du droit, sous la dir. de P. Lascoumes, L.G.D.J., pp 155-177.

Lindenberg S., 2003, « Solidarity, foundations and dependence", in *Conventions and Structures in Economic Organization*, Favereau et Lazega eds., Londres, Edward Elgar.

Lyons B.R., 2000, ' Transaction Costs and the nature of Inter-Firm Contracts', WP, UEA, Norwich.

Macneil I., 1978, "Contracts : Adjustments of long-term economic relations under classical, neoclassical, and relational contract law", *Northwestern University Law Review*, f72 : 854-906.

Marsden D., 1999, *A theory of Employment systems*, Oxford University Press.

Masten S. E., 1999, « Contractual Choice », *Encyclopedia of Law & Economics*, B. Boukaert and G. De Geest (ed.), Edward Elgar Publishing and the University of Ghent.

Morin M.-L., 2000, «L'évolution des relations de travail induit un nouveau partage des risques », in *Le bel avenir du contrat de travail : alternatives au social-libéralisme*, T. Coutrot et C. Ramaux eds., Paris, Ed. La Découverte et Syros.

Pélisse J., 2004, *A la recherche du temps gagné – Sens et usages sociaux des règles autour des 35 heures*, Thèse de doctorat, Université de Marne-la-Vallée.

Pélissier J., 2004, « Clauses informatives et clauses contractuelles du contrat de travail », *Revue de Jurisprudence Sociale*, n°1.

Petit H., 2003, « Les déterminants de la mise en œuvre d'un mode de gestion de l'emploi », Economie et Statistique, n°361, pp. 53-70.

Pignoni M.-T., Zouary P., 2003, « Les nouveaux usages du licenciement pour motif personnel ». *Premières informations et premières synthèses*, DARES, n°28.2, juillet.

Simon H., A., 1951, "A Formal Theory of the Employment Relationship", Econometrica, July 1951, pp. 293-305.

Supiot A. (dir.), 1999, *Au-delà de l'emploi. Transformations du travail et devenir du travail en Europe*, Rapport pour la Commission européenne, Flammarion.

Waquet Ph., 1999, « Le renouveau du contrat de travail », *RJS.* 5/99, pp. 383-394.

Williamson O.E. (1985), *The Economic Institutions of Capitalism : Firms, Markets, Relational Contracting*, New-York, Macmillan, The Free Press, 450 p.

Table 1 : Active variables by typological class

Active variables	Total (309)	Class1 (112)	Class2 (73)	Class3 (58)	Class4 (66)
Guarantees in matter of					
recruitment	1.60	1.24*	1.22	1.98	2.29
breach of contract	2.23	1.78	2.20	2.90	2.42
Definition of employment conditions					
Content of the job					
*Qualification only***	*0.55*	*0.67*	*0.66*	*0.22*	*0.50*
Flexibility	0.39	0.13	0.29	0.81	0.54
Time of working hours					
Invariable time	*0.42*	*0.90*	*0.07*	*0.10*	*0.27*
Temporal flexibility	0.77	0.13	1.38	1.77	0.27
Set basis	0.20	0.01	0.30	0.07	0.66
Paid holydays, illness, absences	0.85	0.42	0.36	1.86	1.26
Workplace					
Fixed-workplace	*0.33*	*0.46*	*0.19*	*0.48*	*0.12*
Geographic flexibility	0.83	0.50	0.71	0.76	1.56
Remuneration					
Fixed bonuses	0.52	0.59	0.55	0.45	0.45
Individual variable bonuses	0.36	0.17	0.24	0.22	0.92
Collective variable bonuses	0.12	0.01	0.36	0.02	0.14
Various fringe benefits	0.18	0.10	0.21	0.26	0.23
The employee's subordination to the firm					
Normative devices of work monitoring	1.02	0.67	0.78	1.59	1.35
Exclusivity and loyalty	0.74	0.50	0.33	0.76	1.56
Protection of the firm's immaterial assets					
Human capital	0.06	0.00	0.00	0.00	0.29
Competitive advantage					
Non-competition clause	0.27	0.04	0.01	0.07	0.95
Respect of clientele	0.18	0.04	0.01	0.02	0.77
Confidentiality	0.92	0.59	0.55	1.01	1.79
Grant back to the employer IPRs	0.17	0.08	0.04	0.00	0.60
Employee's individual accountability	0.53	0.24	0.43	0.88	0.84

Reading :

*: '1.24' means that the average value of the indicator of 'guarantees in matter of recruitment' is 1.24 for all the contracts belonging to the class 1.

** : italic variables correspond to dummy variables. We give the mean with a value between 0 and 1.

Table 2 : References to institutional devices by typological class

Institutional devices	Total (309)	Class1 (112)	Class2 (73)	Class3 (58)	Class4 (66)
Contract formalism					
Number of pages	3.41	2.47	2.51	4.43	5.11
The written document is designed as an « employment contract »	0.82	0.70	0.78	0.98	0.91
unlimited-term contract	0.84	0.76	0.85	0.86	0.95
Qualification (issued from collective agreements)	0.78	0.74	0.86	0.71	0.83
Determination of wages (certain elements of remuneration) in reference to					
Industry collective agreements	0.24	0.30	0.26	0.15	0.21
Company-wide collective agreements	0.14	0.13	0.19	0.10	0.14
Company rules	0.30	0.24	0.27	0.26	0.47
Work monitoring devices	1.02	0.68	0.78	1.59	1.35
Hierarchical authority	0.30	0.21	0.23	0.40	0.45
Managerial norms	0.59	0.44	0.51	0.81	0.74
'tools and equipments'	0.05	0.0	0.01	0.07	0.15
'conduct and presentation'	0.08	0.04	0.03	0.31	0.00
Collective agreements					
Industry-wide					
NBCC (number of references in the 'contract')	2.36	1.84	2.15	3.34	2.60
GCCOL(qualification+wage+breach+trial period)	1.27	1.23	1.32	1.17	1.36
Company-wide					
GACENT (wage and other elements)	0.42	0.37	0.55	0.33	0.44
Trade-specific uses	0.28	0.24	0.36	0.22	0.30
Company rules					
'Règlement intérieur'(RI)	0.54	0.52	0.47	0.66	0.56
Ethic code of conduct	0.11	0.09	0.07	0.16	0.15
Company uses	0.40	0.39	0.33	0.47	0.42
REGENT (wage+RI+ethic code+compagny uses)	1.35	1.24	1.14	1.53	1.61
Reference to law or equivalent	0.61	0.43	0.59	0.84	0.72
'Customers satisfaction'	1.13	0.25	0.34	1.34	3.33

Table 3: Characteristics of jobs by typological class (%)

	Total (309)	Class1 (112)	Class2 (73)	Class3 (58)	Class4 (66)
Characteristics of job					
Work-time					
Full-time	0.75	0.88	0.56	0.50	0.94
Part-time	0.25	0.12	0.44	0.50	0.06
Hierarchical class					
workers	0.10	0.10	0.15	0.12	0.02
ETAM	0.48	0.58	0.49	0.55	0.22
'managers'	0.42	0.32	0.36	0.33	0.76
Gender					
male	0.54	0.55	0.49	0.55	0.58
Female	0.37	0.39	0.42	0.36	0.26
Doesn't know	0.09	0.06	0.08	0.08	0.18
Firm's size					
VSE (<100)	0.20	0.19	0.18	0.24	0.20
SME(between 100 and 500)	0.25	0.14	0.29	0.33	0.30
LE (>500)	0.50	0.60	0.49	0.38	0.44
Doesn't know	0.05	0.07	0.03	0.05	0.06
Staff Turnover					
feeble	0.32	0.45	0.33	0.16	0.27
high	0.24	0.20	0.26	0.33	0.33
Doesn't know	0.44	0.35	0.41	0.51	0.40
Presence of union membership					
No	0.16	0.10	0.11	0.26	0.23
Yes	0.45	0.60	0.45	0.28	0.35
Doesn't know	0.39	0.30	0.44	0.56	0.42
Industry-wide collective agreement or sector					
Any collective agreement	0.04	0.05	0.02	0.05	0.05
Status (public sector LE	0.07	0.13	0.04	0.02	0.05
Agri-food	0.05	0.05	0.05	0.02	0.06
Chemical	0.06	0.07	0.06	0.04	0.05
UIMM- metallurgy	0.08	0.13	0.05	0.02	0.08
trade	0.12	0.07	0.23	0.08	0.09
Hotel-café-restaurant	0.07	0.05	0.08	0.19	0.00
Road transport	0.07	0.04	0.10	0.16	0.04
Flying transports, ground staff	0.03	0.05	0.04	0.03	0.00
Banks	0.06	0.09	0.07	0.02	0.01
Assurances and other financial act.	0.04	0.06	0.01	0.00	0.08
Techni. and engineering consultants	0.14	0.05	0.02	0.10	0.45
Other services	0.18	0.17	0.23	0.28	0.05
Periods					
1970-1992	0.14	0.25	0.08	0.07	0.08
1993-1999	0.33	0.30	0.40	0.38	0.28
2000-2004	0.53	0.45	0.52	0.55	0.64

Methodological and statistical annexe

Our data base is constituted of 309 'employment contracts' from over 200 firms in different sectors of activity. The present annexe contains details on the method used to collect contracts, the question of representativeness of the data base and that of the 'formalism' of the contract which poses a problem of equivalence of the documents in the base, and the characteristics of jobs and firms. Finally, we give some information concerning the construction of our statistical typology. The table 4 recapitulates the construction of the variables in our typological analysis and, in particular, the construction of synthetic indicators. Table 5 gives the contribution of each variable for each typological class.

Collection methods

These documents were drawn from six main sources. Initially our objective was to collect 'employment contracts' from representatives of firms in order to obtain precise information on the environment of the contract: the company's HR management policy and its practices in drawing up contracts. However, this was such an unwieldy task that we decided to diversify our sources (see table), so that 'contracts' collected directly from employers finally accounted for only 24.6% of the sample. Contracts obtained from a legal firm (26.5%) or trade unions (10.7%) may have introduced a bias since they were taken from case files and therefore concerned disputes. Yet very few disputes directly concern contractual commitments as such, and most often concern only one clause. The collection of 'contracts' from employees (23.0%) via networks of friends and family helped to expand the data base, as did contracts obtained from the labour inspection office (15.2%), most of which corresponded to part-time contracts in the framework of the government measure to reduce social charges by 30% – a measure cancelled by the so-called Aubry law on the 35-hour working week, passed in 2000.

Note that the different nature of these sources introduces no bias into the sample. This was checked by means of the various indicators used in our analysis.

Representativeness of the data base

The question of representativeness of the data base is tricky and remains important if we reason in terms of an evolution over the three periods distinguished: 1970-1992 (14%), 1993-1999 (33%) and 2000-2004 (53%). The typology serves to identify links between the variables ('contractual structure'). The variables of job characterization serve as an illustration. In this type of contractual structure we can simply say that a particular type of job, firm or sector is essentially absent or present.

To revert to the different phases, the year 1993 was chosen as a threshold because it corresponded to the entry into application of the 13 October 1991 European directive relative to 'the employer's obligation to inform the worker of conditions applicable to the contract or to the employment relationship'. The late eighties and early nineties also witnessed a new legal precedent concerning the amendment of the employment contract, that reinforced the intangibility of the contract, in particular. The other milestone chosen was the year 2000 which corresponds to the second Aubry law on the 35-hour working week. As our different observations show (especially interviews with HR managers), not only did collective negotiation around reduced working time result in amendments to the employment contract, those amendments also led to an increase in unlimited-term contracts, especially by introducing standard clauses corresponding to the working times opted for by the employee.

This increase in unlimited-term contracts in the past ten years, in a country where labour legislation imposes no constraints in this respect, explains why the latter two phases in our sample are over-represented. But this notion of representativeness is problematical when we have no precise data on the parent group, that is, all employees who signed a document at the time of their recruitment, for each period. Consequently, we give only a few indications concerning representativeness, based on the characteristics of jobs and firms in our base.

Formalism of the contract

The form of the document poses another problem of equivalence. Written documents are distinguished in terms of whether they are explicitly drafted as 'contracts' or are rather in the form of a letter of appointment. In the latter case, the document is usually less detailed because it concentrates more on the time of the recruitment, mentioning

the main elements of the 'contract', and less on breach of the contract and management of the post-contract stage.

We did not take into account the fact of the 'contract' having a standardized form or not. Most of these documents are standard contracts and usually refer to a class of employee. Some are written in a more personalized mode that attests to the negotiation of certain clauses or particular advantages, but that remains an exception. We can conclude that, in most cases, the cost of drawing up a contract is relatively low once the investment has been made in drafting a standard contract or standard clauses. More and more firms use software for drafting contracts.

We distinguished unlimited-term contracts from particular contracts and especially fixed-term contracts, for which certain very precise legal constraints exist in French law as far as their form is concerned. In the latter case, apart from the fact that this type of contract relates to short-term commitments, it seems that anticipated inspection by government or judicial authorities ('requalification in unlimited-term contract') can prompt employers to comply with labour legislation more readily than they would otherwise have done. The same applies to part-time contracts.

It is because the different types of contract correspond to different types of constraint and to manpower management choices that we tried to be 'representative' in this respect throughout the entire sample – at least to give some validity to the frequency of the different types of clause or information. For instance, 16% of the 'contracts' in the data base are fixed-term contracts and 25% are part-time contracts, which is close to the national mean over the past few years in the case of the former (11% in 2000, INSEE employment survey), and slightly over-represented in the case of the latter (reportedly around 17%).

We constructed a quantitative variable to account for the size of the written document based on the number of pages. This is a way of taking into consideration the role that the employer wants the written document to play, although we did not distinguish clauses that which could correspond to a contractual commitment binding the two parties, and those that could be considered as elements of information. This distinction is, moreover, problematical and the cause of many legal disputes, especially regarding

amendments to the employment contract (Pélissier, 2004). Note that the number of pages is calculated by taking into account only the annexes to which the body of the 'contract' explicitly refers.

The characteristics of jobs and firms

Due to the relative weakness of our sample and the fact that we have little information on the environment of certain contracts, we have selected only a small number of elements to characterize jobs (see Table 3).

Apart from the legal nature of the contract (fixed-term or unlimited), we distinguish jobs in terms of whether they are full- or part-time, the hierarchical class in the sense of collective agreements (workers/ETAM[21]/'managers') and the type (male/female/doesn't know).

In the same perspective, the share of contracts signed by 'managers', in the sense of industry-wide collective agreements, is most probably over-represented (42%). In the absence of figures on the parent group as regards this mode of classification, this figure can be related to the share of the 'managers and professionals' in the total working population (excluding farmers and artisans), which was around 15% in 1999 (last population census). But it seems that it is the occupational class in which the drafting of contracts is the most frequent. A recent study on trials shows that 85% of managers' contracts are written (Fontaine, 2003).

Information on firms concerns the size of the firm (<100, between 100 and 500, >500), the impact or not of staff turnover on the job class considered, and the presence or not of union membership. For the latter two variables, three modalities were chosen, the last of which referred to absences of answers ('doesn't know').

We constructed a variable enabling us to characterize the collective agreement to which the employment contract corresponded. In the case where there were too few employees we formed groups in relation to a business sector. A total of 13 modalities were selected, one of which corresponded to jobs not governed by any collective

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[21] *"employés, techniciens, agents de maîtrise"* : professional category of clerical workers, technicians and supervisory staff.

agreement. Another corresponded to contracts relative to jobs in large public-sector corporations. Among the conventions that were well-represented was the one applicable to staff of 'technical consultants, engineering consultants and consulting firms', the collective agreement of the 'Parisian UIMM', banks and 'hotels-restaurants'. The other modalities represent sectors (agri-food, chemicals, trade and especially food trade).

Typology and construction of synthetic variables

For constructing the typology, we used the hierarchical ascending classification technique. This technique is based on the criterion of variance (CAHQUAL procedure of the SAS software). We have retained a four classes partition for the sake of clarity of the presentation. Note that this partition into four classes substantially increases the intra-class variance, compared to the partition into six classes (from 71% to 77% of the share of total variance). We furthermore chose highly synthetic classes, that is, constructed by several variables and not only one, which was the case of two classes in the more disaggregated partition.

In table 4, we give the way we have elaborated synthetic indicators by adding dummy variables. In table 5 we give, for all active variables, the signed decomposition of RHO2; that means the distance between the centre of classes and the gravity centre of the cloud. That gives some indication of the contribution of each active variable to the construction of the four classes. Note that we have added four dummy variables: QUAL1 (mention of the employment qualification without any additional definition of the content of the job), LIEU1 (explicit mention of the workplace without any clause of mobility), DUREW1 (invariable time of working hours) and FORFH1 (working hours defined on a set basis). All in all, we have retained 22 actives variables for constructing the typology.

Table 4: Active variables representing synthetic indicators

Variables	Name	Definition	Mean
Recruitment guarantees	GAREMB	Libre+etaciv+cv+vmtest+foremb	1.60
	Libre	Employee's availability	0.45
	Etaciv	CV information and modification	0.45
	Cv	Elements of proof of CV	0.15
	Vmtest	Medical and aptitude tests	0.49
	foremb	Obligation to follow an entry training	0.07
Conditions of breach of employment relationship	INFOER	Condlic+preav+dpe+ruptpe	2.23
	Condlic	Conditions of breach of contract (dismissal and quit, except notices)	0.47
	Preav	Mention of length of notice	0.40
	Dpe	Mention of trial period	0.79
	ruptpe	Conditions of breach of trial period	0.57
Flexibility of the job content	FLEXEMP	Poly+flexfn	0.39
	Poly	Multi-skills obligation	0.11
	Flexfn	Functional flexibility	0.21
	train	Training obligation during the contract	0.08
Geographic flexibility	FLEXGEO	Depla+mobi	0.83
	Depla	Trips obligation	0.35
	mobi	Geographic mobility	0.47
Temporal flexibility	FLEXTEMP	Flexh+hsup+hatyp	0.77
	Flexh	Flexibility of work hours	0.36
	Hsup	Extra hours obligation	0.26
	hatyp	Unusual working hours	0.15
Paid holydays and work time control	INFOCGABS	Cgp+mala+abs	0.85
	Cgp	Mention of paid holydays	0.50
	Mala	Mention relative to illness an maternity	0.16
	abs	Obligation for the employee to declare his absences	0.19
Set bonuses	Primes fixes	Rpr13+ranc+rprcdt	0.52
	Rpr13	Extra month's salary or equivalent	0.31
	Ranc	Seniority bonuses	0.08
	rprcdt	Particular work conditions compensation	0.07
Individual bonuses	IREM	Perfind+clobj+stocko	0.36
	Perfin	Remuneration according to individual performances	0.22
	Clobj	Objectives clause	0.12
	stocko	Stock-options	0.02
Collective bonuses	RPCOL	Pcol+interes	0.11
	Pcol	Collective bonuses	0.02
	Interes	Sharing profit agreement	0.09
Work monitoring devices	NORMS	Autoh+manag+outil+tenu	1.02
	Autoh	The employee is placed under the authority of a supervisor	0.30
	Manag	Obligation for the employee to follow managerial norms	0.59
	Outil	Obligation to work with certain tools, equipment or product	0.05
	tenu	Obligation in terms of 'conduct and presentation'	0.08
Exclusivity	EXCLUS	Exclu+fidel+resid	0.74
	Exclu	Exclusivity clause	0.41
	Fidel	Loyalty clause	0.27
	resid	Obligation to have a place of abode close to the work place	0.06
Human capital protection	PROTCH	Dedif+nondeb	0.06
	Dedif	Forfeit for training clause	0.03
	Nondeb	No poaching clause	0.04
Competitive advantage protection	ACONCU	Concu+concind	0.27
	Concu	Non-competition clause	0.20
	concind	Non-competition compensation	0.07
Firm's property rights upon the clientele	ACLI	Gestcli+respecli	0.18
	Gestcli	Compagny's right to allocate the clientele	0.04
	respecli	Obligation to respect the firm's clientele after the breach of the contract	0.14
Confidentiality clause	ACONF	Discret+restit+publi	0.92
	Discret	Obligation of discretion (trade secret)	0.59
	Restit	Restoration of goods and technical documents	0.26
	publi	Researchers' authorization to publish	0.07
Grant back to the employers IPrs	PROTPI	Pibrev+pilog+marq	0.17
	Pibrev	In matter of patent	0.07
	Pilog	In matter of copyrights (software)	0.09
	marq	Interdiction of the use of the trademark for personal goal	0.01
Employee's individual accountability	RESP	Rescvi+autresp+obmoy+licfaut+resilia	0.52
	Resciv	Obligation to contract an insurance for civil liability	0.07
	Autresp	Other clauses of liability	0.14
	Obmoy	Obligation of means	0.07
	Licfaut	Defined 'misconduct' leading to dismissal	0.21
	Resilia	Defined 'misconduct'leading to the suspension of the employment contract	0.03

Table 5: Signed decomposition of RHO2 following active variables

(1/1000, except RHO2)

	Class1 (112)	Class2 (73)	Class3 (58)	Class4 (66)
RHO2	3.425	2.733	5.044	10.193
Active variables				
GAREMB	-22	30	17	27
INFOER	-34	0	54	2
QUAL1	18	18	-83	-1
FLEXEMP	-43	-8	83	6
DUREW1	277	-186	-82	-9
FLEXTEMP	-111	132	192	-23
FORH1	-68	16	-22	77
INFOCGABS	-54	-89	197	16
LIEU1	24	-32	21	-19
FLEXGEO	-49	-7	-1	84
PRIMFIX	3	1	-3	-1
IREM	-19	-11	-7	61
RPCOL	-29	164	-17	0
AVNAT	-13	1	8	1
NORMS	-45	-27	86	14
EXCLUS	-21	-80	0	88
PROTCH	-17	-22	-24	78
ACONCU	-31	-28	-24	134
ACLI	-31	-51	-27	163
ACONF	-42	-67	3	101
PROTPI	-10	-26	-24	82
RESP	-39	-4	12	39